

**Introduced by Senator Speier**

(Coauthors: Assembly Members Jones, Maze, and Mullin)

February 8, 2005

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An act to amend Sections 8547.7, 8547.8, 8547.9, 19583.5, and 19702 of, to add Chapter 9.5 (commencing with Section 19640) to Part 2 of Division 5 of Title 2 of, and to repeal Article 1 (commencing with Section 19680) of Chapter 10 of Part 2 of Division 5 of Title 2 of, the Government Code, relating to the Office of the Special Counsel.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 165, as introduced, Speier. Office of the Special Counsel.

(1) Under the California Whistleblower Protection Act, the State Personnel Board is charged with initiating a hearing or investigation of a written complaint of reprisal or retaliation against a state employee who complains of improper governmental activity, as provided.

This bill would repeal these provisions and instead, establish the Office of the Special Counsel within the State Personnel Board to protect state employees and applicants for state employment from prohibited personnel practices, as specified, to receive and investigate allegations of alleged violations of those provisions, and to initiate disciplinary proceedings. The Special Counsel would be appointed by the Governor, subject to confirmation by the Senate, for a 6-year term and may not be removed from office during that term, except for good cause.

This bill would establish procedures for the Special Counsel with respect to investigating allegations of prohibited personnel practices, reporting the status of investigations, requesting a stay of personnel action by the board, and recommending corrective action. The bill

would require the Special Counsel to submit an annual report to the Legislature and to the board on its activities.

This bill would make conforming changes to existing law.

(2) Existing law requires the State Auditor to report the nature and details of an alleged improper governmental activity to the head of the employing agency or the appropriate appointing authority.

This bill would require the State Auditor, in those instances where he or she determines that the employing agency or appropriate appointing agency has not taken sufficient steps to discipline a state employee, to refer the matter to the Office of the Special Counsel and request the Special Counsel to initiate disciplinary proceedings.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 8547.7 of the Government Code is  
2 amended to read:

3 8547.7. (a) If the State Auditor determines that there is  
4 reasonable cause to believe that an employee or state agency has  
5 engaged in any improper governmental activity, he or she shall  
6 report the nature and details of the activity to the head of the  
7 employing agency, or the appropriate appointing authority. If  
8 appropriate *and notwithstanding Section 7550.5*, the State  
9 Auditor shall report this information to the Attorney General, the  
10 policy committees of the Senate and Assembly having  
11 jurisdiction over the subject involved, and to any other authority  
12 that the State Auditor determines appropriate.

13 (b) The State Auditor ~~shall~~*does* not have any enforcement  
14 power. In any case in which the State Auditor submits a report of  
15 alleged improper activity to the head of the employing agency or  
16 appropriate appointing authority, that individual shall report to  
17 the State Auditor with respect to any action taken by the  
18 individual regarding the activity, the first report being transmitted  
19 no later than 30 days after the date of the State Auditor's report  
20 and monthly thereafter until final action has been taken. *In any*  
21 *instance where the State Auditor determines that the employing*  
22 *agency or appropriate appointing authority has not taken*  
23 *sufficient steps to discipline a state employee whom the State*  
24 *Auditor has determined, based on its investigative findings, has*

1 *engaged in misconduct, the State Auditor shall refer the matter to*  
2 *the Office of the Special Counsel, and request that the Special*  
3 *Counsel initiate disciplinary proceedings against the employee in*  
4 *accordance with Section 19583.5.*

5 (c) Every investigative audit shall be kept confidential, except  
6 that the State Auditor may issue any report of an investigation  
7 that has been substantiated, keeping confidential the identity of  
8 the individual or individuals involved, or release any findings  
9 resulting from an investigation conducted pursuant to this article  
10 that is deemed necessary to serve the interests of the state.

11 (d) This section shall not limit any authority conferred upon  
12 the Attorney General or any other department or agency of  
13 government to investigate any matter.

14 SEC. 2. Section 8547.8 of the Government Code is amended  
15 to read:

16 8547.8. (a) A state employee or applicant for state  
17 employment who files a written complaint with his or her  
18 supervisor, manager, or the appointing power alleging actual or  
19 attempted acts of reprisal, retaliation, threats, coercion, or similar  
20 improper acts prohibited by Section 8547.3, may also file a copy  
21 of the written complaint with the ~~State Personnel Board~~ *Office of*  
22 *the Special Counsel*, together with a sworn statement that the  
23 contents of the written complaint are true, or are believed by the  
24 affiant to be true, under penalty of perjury. The complaint filed  
25 with the ~~board~~ *Office of the Special Counsel*, shall be filed within  
26 12 months of the most recent act of reprisal complained about.

27 (b) Any person who intentionally engages in acts of reprisal,  
28 retaliation, threats, coercion, or similar acts against a state  
29 employee or applicant for state employment for having made a  
30 protected disclosure, is subject to a fine not to exceed ten  
31 thousand dollars (\$10,000) and imprisonment in the county jail  
32 for a period not to exceed one year. Pursuant to ~~Section 19683~~  
33 *Article 3 (commencing with Section 19660) of Chapter 9.5 of*  
34 *Part 2 of Division 5*, any state civil service employee who  
35 intentionally engages in that conduct shall be disciplined by  
36 adverse action as provided by Section 19572.

37 (c) In addition to all other penalties provided by law, any  
38 person who intentionally engages in acts of reprisal, retaliation,  
39 threats, coercion, or similar acts against a state employee or  
40 applicant for state employment for having made a protected

1 disclosure shall be liable in an action for damages brought  
2 against him or her by the injured party. Punitive damages may be  
3 awarded by the court where the acts of the offending party are  
4 proven to be malicious. Where liability has been established, the  
5 injured party shall also be entitled to reasonable attorney's fees  
6 as provided by law. However, any action for damages shall not  
7 be available to the injured party unless the injured party has first  
8 filed a complaint with the ~~State Personnel Board~~ *Office of the*  
9 *Special Counsel* pursuant to subdivision (a), and the ~~board has~~  
10 ~~issued, or failed to issue, findings pursuant to Section 19683~~  
11 *Office of the Special Counsel has declined to initiate proceedings*  
12 *concerning the matter pursuant to Article 3 (commencing with*  
13 *Section 19660) of Chapter 9.5 of Part 2 of Division 5.*

14 (d) This section is not intended to prevent an appointing  
15 power, manager, or supervisor from taking, directing others to  
16 take, recommending, or approving any personnel action or from  
17 taking or failing to take a personnel action with respect to any  
18 state employee or applicant for state employment if the  
19 appointing power, manager, or supervisor reasonably believes  
20 any action or inaction is justified on the basis of evidence  
21 separate and apart from the fact that the person has made a  
22 protected disclosure as defined in subdivision (b) of Section  
23 8547.2.

24 (e) In any civil action or administrative proceeding, once it has  
25 been demonstrated by a preponderance of evidence that an  
26 activity protected by this article was a contributing factor in the  
27 alleged retaliation against a former, current, or prospective  
28 employee, the burden of proof shall be on the supervisor,  
29 manager, or appointing power to demonstrate by clear and  
30 convincing evidence that the alleged action would have occurred  
31 for legitimate, independent reasons even if the employee had not  
32 engaged in protected disclosures or refused an illegal order. If the  
33 supervisor, manager, or appointing power fails to meet this  
34 burden of proof in an adverse action against the employee in any  
35 administrative review, challenge, or adjudication in which  
36 retaliation has been demonstrated to be a contributing factor, the  
37 employee shall have a complete affirmative defense in the  
38 adverse action.

39 (f) Nothing in this article shall be deemed to diminish the  
40 rights, privileges, or remedies of any employee under any other

1 federal or state law or under any employment contract or  
2 collective bargaining agreement.

3 SEC. 3. Section 8547.9 of the Government Code is amended  
4 to read:

5 8547.9. Notwithstanding Section 19572, if the ~~State Personnel~~  
6 ~~Board~~ *Office of the Special Counsel* determines that there is a  
7 reasonable basis for an alleged violation, or finds an actual  
8 violation of Section 8547.3 ~~or 19683~~, it shall transmit a copy of  
9 the investigative report to the State Auditor. All working papers  
10 pertaining to the investigative report shall be made available  
11 under subpoena in a civil action brought under Section ~~19683~~  
12 ~~19676~~.

13 SEC. 4. Section 19583.5 of the Government Code is amended  
14 to read:

15 19583.5. ~~(a)~~ Any person, except for a current ward or inmate  
16 of the California Youth Authority or the Department of  
17 Corrections, ~~with the consent of the board or the appointing~~  
18 ~~power or a representative of a ward or inmate~~, may file charges  
19 against an employee requesting that *the Office of the Special*  
20 *Counsel initiate* adverse action ~~be taken~~ for one or more causes  
21 for discipline specified in this article. Charges filed by a person  
22 who is a state employee shall not include issues covered by the  
23 state's employee grievance or other merit appeals processes. Any  
24 request of the ~~board~~ *Office of the Special Counsel* to file charges  
25 pursuant to this section shall be filed within one year of the event  
26 or events that led to the filing. ~~The employee against whom the~~  
27 ~~charges are filed shall have a right to answer as provided in this~~  
28 ~~article. In all of these cases, a hearing shall be conducted in~~  
29 ~~accord with this article and if the board finds that the charges are~~  
30 ~~true it shall have the power to take any adverse action as in its~~  
31 ~~judgment is just and proper.~~ An employee who has sought to  
32 bring a charge or an adverse action against another employee  
33 using the grievance process, shall first exhaust that administrative  
34 process prior to bringing the case to the board. *The Office of the*  
35 *Special Counsel shall process any request to initiate disciplinary*  
36 *action that it receives in accordance with Article 3 (commencing*  
37 *with Section 19660) of Chapter 9.5 of Part 2 of Division 5.*

38 ~~(b) This section shall not be construed to supersede Section~~  
39 ~~19682.~~

SEC. 5. Chapter 9.5 (commencing with Section 19640) is added to Part 2 of Division 5 of Title 2 of the Government Code, to read:

CHAPTER 9.5. THE OFFICE OF THE SPECIAL COUNSEL

Article 1. General Provisions

19640. This chapter shall be known and referred to as the Special Counsel Act.

19641. As used in this chapter, unless a different meaning clearly appears from the context:

(a) "Board" means the State Personnel Board.

(b) "Office" means the Office of the Special Counsel.

Article 2. The Office of the Special Counsel

19646. (a) There is hereby established within the State Personnel Board the Office of the Special Counsel, which shall be headed by the Special Counsel.

(b) In order to be free of organizational impairments to independence, the Office of the Special Counsel shall be deemed to be within the executive branch of state government, but shall not be subject to control or direction by any officer or employee of the executive branch.

(c) The office shall be structured as a separate branch of the State Personnel Board, reporting directly to the members of the board.

(d) In order to remove any possibility of conflicts of interest, neither the Special Counsel nor his or her designee shall serve as legal counsel to the members of the board.

19647. The Office of the Special Counsel shall perform the following duties:

(a) Protect state employees and applicants for state employment from prohibited personnel practices, as set forth in Sections 8547.3 and 19702.

(b) Receive and investigate allegations of violations of Sections 8547.3 and 19702 and, where appropriate, initiate disciplinary action proceedings for such violations under Article

3 (commencing with Section 19660) of Chapter 9.5 of Part 2 of Division 5.

(c) Receive and investigate, pursuant to Section 19583.5, allegations of violations of Section 19572 and, where appropriate, initiate disciplinary action proceedings for such violations under Article 3 (commencing with Section 19660) of Chapter 9.5 of Part 2 of Division 5.

19648. (a) The Special Counsel shall be appointed by the Governor, subject to confirmation by the Senate, to a six-year term. The Special Counsel may not be removed from office during that term, except for good cause.

(b) Consistent with subdivision (b) of Section 19646, the Special Counsel shall not be subject to the direction or control by any agent or employee of the State Personnel Board, or any other state agency.

(c) The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position.

19649. (a) The annual salary for the Special Counsel shall be equivalent to that of the salary for the career executive assignment position of a Chief Counsel I as established by the Department of Personnel Administration.

(b) The Special Counsel shall be reimbursed for all actual expenses incurred or paid by him or her in the discharge of his or her official duties.

19650. (a) The Special Counsel may appoint legal, investigative, administrative, and support personnel necessary to perform the functions of Office of the Special Counsel.

(b) Any appointment made under this section shall be made in accordance with procedures established by the board.

(c) All employees of the Office of the Special Counsel shall be designated as excluded employees, as defined in Section 3527.

19651. The permanent office of the Special Counsel shall be in Sacramento. The board shall ensure that the Special Counsel is provided with suitable and sufficient offices.

### Article 3. Investigations and Corrective Action

19660. (a) The Special Counsel shall receive any allegation of a prohibited personnel action in violation of Sections 8547.3

1 and 19702, and shall investigate the allegation to the extent  
2 necessary to determine whether there are reasonable grounds to  
3 believe that a violation has occurred, exists, or may be taken.

4 (b) Pursuant to Section 19663, the Special Counsel shall  
5 receive any allegation that a state employee has violated one or  
6 more of the provisions of Section 19572, and shall investigate the  
7 allegation to the extent necessary to determine whether there are  
8 reasonable grounds to believe that a violation has occurred,  
9 exists, or may be taken.

10 (c) Within 15 days after the date of receiving an allegation of  
11 a prohibited personnel practice pursuant to subdivision (a), or an  
12 allegation of a violation of Section 19572 pursuant to subdivision  
13 (b), the Special Counsel shall provide written notice to the person  
14 who made the allegation of both of the following:

15 (1) The allegation has been received by the Special Counsel.

16 (2) The name of a person at the Office of the Special Counsel  
17 who shall serve as a contact with the person making the  
18 allegation.

19 19661. (a) Unless an investigation is terminated under  
20 Section 19662, the Special Counsel shall do all of the following:

21 (1) Within 90 days after notice is provided under subdivision  
22 (c) of Section 19677, notify the person who made the allegation  
23 of the status of the investigation and any action taken by the  
24 office since the filing of the allegation.

25 (2) Notify the person who made the allegation of the status of  
26 the investigation and any action taken by the office since the last  
27 notice, at least every 60 days after notice is given under  
28 paragraph (1).

29 (3) Notify the person who made the allegation of the status of  
30 the investigation and any action taken by the Special Counsel at  
31 such time as determined appropriate by the Special Counsel.

32 (b) (1) No later than 10 days before the Special Counsel  
33 terminates any investigation of a prohibited personnel practice or  
34 a violation of Section 19572, the Special Counsel shall provide a  
35 written status report to the person who made the allegation of the  
36 proposed findings of fact and legal conclusions.

37 (2) The person may submit written comments about the report  
38 to the Special Counsel.

39 (3) The Special Counsel shall not be required to provide a  
40 subsequent written status report under this subdivision after the



1 submission of the written comments provided pursuant to  
2 paragraph (1).

3 19662. (a) If the Special Counsel terminates any  
4 investigation, the Special Counsel shall prepare and transmit to  
5 any person on whose allegation the investigation was initiated a  
6 written statement notifying the person of all of the following:

7 (1) The termination of the investigation.

8 (2) A summary of relevant facts ascertained by the Special  
9 Counsel, including the facts that support, and the facts that do not  
10 support, the allegations made by that person.

11 (3) The reasons for terminating the investigation.

12 (4) A response to any comments submitted under subdivision  
13 (a) of Section 19661.

14 (b) A written statement under subdivision (a) may not be  
15 admissible as evidence in any judicial or administrative  
16 proceeding, without the consent of the person who received such  
17 statement under subdivision (a).

18 19663. (a) Except in a case in which a state employee or  
19 applicant for state employment has the right to appeal directly to  
20 the board under any law, rule, or regulation, a state employee or  
21 applicant for state employment shall seek corrective action from  
22 the Special Counsel before seeking corrective action from the  
23 board. A state employee or applicant for state employment may  
24 seek corrective action from the board under Section 19670, if  
25 paragraph (1) or (2) occurs:

26 (1) (A) The state employee or applicant for state employment  
27 seeks corrective action for a prohibited personnel practice  
28 described in Section 8547.3, 19702, or 19572 from the Special  
29 Counsel.

30 (B) The Special Counsel notifies the state employee or  
31 applicant for state employment that an investigation concerning  
32 that state employee or applicant for state employment has been  
33 terminated.

34 (C) No more than 60 days have elapsed since notification was  
35 provided to the state employee or applicant for state employment  
36 that the investigation was terminated.

37 (2) More than 120 days have elapsed since the state employee  
38 or applicant has sought corrective action from the Special  
39 Counsel, and the state employee or applicant for state  
40 employment has not been notified by the Special Counsel that the

1 Special Counsel shall seek corrective action on behalf of the state  
2 employee or applicant for state employment.

3 (b) In addition to any authority granted under Sections 19660  
4 and 19661, the Special Counsel may, in the absence of an  
5 allegation, conduct an investigation for the purpose of  
6 determining whether there are reasonable grounds to believe that  
7 a prohibited personnel practice or a pattern of prohibited  
8 personnel practices has occurred, exists, or may be taken.

9 19664. (a) (1) The Special Counsel may request that the  
10 members of the board issue, by majority vote, a stay of any  
11 personnel action for 45 days if the Special Counsel determines  
12 that there are reasonable grounds to believe that the personnel  
13 action was taken, or may be taken, as a result of a prohibited  
14 personnel practice.

15 (2) The members of the board shall order the stay unless the  
16 members determine that, under the facts and circumstances  
17 involved, such a stay would not be appropriate.

18 (3) Unless denied under paragraph (2), any stay under this  
19 subdivision shall be granted during the first regularly scheduled  
20 board meeting that occurs after the date of the request for the stay  
21 by the Special Counsel.

22 (b) The board may extend the period of any stay granted under  
23 subdivision (a) for any period that the board considers  
24 appropriate.

25 (c) The board shall allow any appointing authority that is the  
26 subject of a stay to comment to the board on any extension of  
27 stay proposed under subdivision (b).

28 (d) A stay may be terminated by the board at any time, except  
29 that a stay may not be terminated by the board under the  
30 following circumstances:

31 (1) On its own motion or on the motion of an appointing  
32 authority, unless notice and opportunity for oral or written  
33 comments are first provided to the Special Counsel and the  
34 individual on whose behalf the stay was ordered.

35 (2) On motion of the Special Counsel, unless notice and  
36 opportunity for oral or written comments are first provided to the  
37 individual on whose behalf the stay was ordered.

38 19665. (a) (1) Except as provided under paragraph (2), no  
39 later than 240 days after the date of receiving an allegation of a  
40 prohibited personnel practice under subdivision (a) of Section

1 19660, the Special Counsel shall make a determination whether  
2 there are reasonable grounds to believe that a prohibited  
3 personnel practice has occurred, exists, or may be taken.

4 (2) If the Special Counsel is unable to make the required  
5 determination within the 240-day period specified under  
6 paragraph (1) and the person submitting the allegation of a  
7 prohibited personnel practice agrees to an extension of time, the  
8 determination shall be made within the additional period of time  
9 as shall be agreed upon between the Special Counsel and the  
10 person submitting the allegation.

11 (b) If, in connection with any investigation, the Special  
12 Counsel determines that there are reasonable grounds to believe  
13 that a prohibited personnel practice has occurred, exists, or is to  
14 be taken which requires corrective action, the Special Counsel  
15 shall report the determination together with any findings or  
16 recommendations to the appointing authority involved. The  
17 Special Counsel may include in the report recommendations for  
18 corrective action to be taken.

19 (c) If, after a reasonable period of time, the appointing  
20 authority does not act to correct the prohibited personnel  
21 practice, the Special Counsel may petition the board for  
22 corrective action.

23 (d) If the Special Counsel finds, in consultation with the  
24 individual subject to the prohibited personnel practice, that the  
25 appointing authority has acted to correct the prohibited personnel  
26 practice, the Special Counsel shall file that finding with the  
27 board, together with any written comments that the individual  
28 may provide.

29 (e) A determination by the Special Counsel under this section  
30 shall not be cited or referred to in any proceeding under this  
31 article or any other administrative or judicial proceeding for any  
32 purpose, without the consent of the person submitting the  
33 allegation of a prohibited personnel practice.

34 19666. (a) Whenever the Special Counsel petitions the board  
35 for corrective action, the board shall provide an opportunity for  
36 both of the following:

37 (1) Oral or written comments by the Special Counsel, and the  
38 appointing authority involved.

39 (2) Written comments by any individual who alleges that he or  
40 she is the subject of the prohibited personnel practice.

(b) The board shall order corrective action as the board considers appropriate, if the board determines that the Special Counsel has demonstrated that a prohibited personnel practice has occurred, exists, or may be taken.

19667. (a) Judicial review of any final order or decision of the board under this chapter may be obtained by any employee, former employee, or applicant for employment adversely affected by the order or decision.

(b) (1) If, in connection with any investigation under this chapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the appointing authority involved.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice or a violation of Section 19572 has occurred, exists, or may be taken, the Special Counsel shall proceed with any investigation or proceeding unless both of the following occur:

(A) The alleged violation has been reported to the Attorney General.

(B) The Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

19668. (a) If, in connection with any investigation under this chapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subdivision (b) of Section 19667, the Special Counsel shall report such violation to the appointing authority involved.

(b) The Special Counsel shall require, within 30 days after the receipt of the report by the appointing authority, a certification that states both of the following:

(1) That the appointing authority has personally reviewed the report.

(2) What action has been or will be taken, and when the action will be completed.

(c) During any investigation initiated under this chapter, no disciplinary action shall be taken against any employee for any

1 alleged prohibited activity under investigation or for any related  
2 activity without the approval of the special counsel.

3 (d) If the board orders corrective action under this chapter, the  
4 corrective action may include both of the following:

5 (1) That the individual be placed, as nearly as possible, in the  
6 position the individual would have been in had the prohibited  
7 personnel practice not occurred.

8 (2) Reimbursement for attorney's fees, back pay and related  
9 benefits, medical costs incurred, travel expenses, and any other  
10 reasonable and foreseeable consequential damages.

11  
12 Article 4. Disciplinary Action  
13

14 19670. (a) Except as provided in subdivision (f), if the  
15 Special Counsel determines that disciplinary action should be  
16 taken against any employee for having committed a prohibited  
17 personnel practice in violation of Section 8547.3 or 19702, or for  
18 having violated Section 19572, the Special Counsel shall prepare  
19 a written complaint against the employee containing the Special  
20 Counsel's determination, together with a statement of supporting  
21 facts, and present the complaint and statement to the employee  
22 and the board.

23 (b) Any complaint filed against an employee pursuant to  
24 subdivision (a), shall include the following information:

25 (1) The reasons for the action.

26 (2) A copy of the charges.

27 (3) A copy of all materials on which the action is based.

28 (4) Notice of the employee's right to be represented in  
29 proceedings under this article.

30 (c) Any employee against whom a complaint has been  
31 presented to the board under subdivision (a) is entitled to all of  
32 the following:

33 (1) File an answer to the complaint in writing to the board  
34 within 30 days from the date of service of the notice of  
35 complaint, and to furnish affidavits and other documentary  
36 evidence in support of the answer.

37 (2) Be represented by an attorney or other representative.

38 (3) A hearing before the board or an administrative law judge  
39 designated by the board. The hearing shall be conducted in  
40 accordance with the laws and rules applicable to a board hearing

1 concerning appeals from notices of adverse action, including all  
2 applicable discovery provisions.

3 (d) Whenever the board finds that the complained of conduct  
4 constitutes legal cause for discipline under one or more  
5 subdivisions of Section 19572, it shall impose a just and proper  
6 penalty and cause an entry to that effect to be made in the  
7 employee's official personnel records.

8 (e) Judicial review of any final order or decision of the board  
9 under this section may be obtained by any employee adversely  
10 affected by such order or decision.

11 (f) In the case of a state employee deemed to be exempt from  
12 the state civil service pursuant to Section 4 of Article VII of the  
13 California Constitution, the complaint and statement referred to  
14 in subdivision (a) of Section 19670, together with any response  
15 of the employee, shall be presented to the Governor, or other  
16 entity deemed appropriate by the Special Counsel, for  
17 appropriate action in lieu of being presented under subdivisions  
18 (a) to (e), inclusive.

19  
20 Article 5. Authority of the Special Counsel

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22 19676. (a) In connection with any investigation conducted by  
23 the office, the Special Counsel or his or her designee, may do any  
24 of the following:

25 (1) Administer oaths.

26 (2) Certify to all official acts.

27 (3) Issue subpoenas for the attendance of witnesses and the  
28 production of papers, books, accounts, or documents, or for the  
29 making of oral or written statements, in any interview conducted  
30 as part of an investigation.

31 (b) Any subpoena issued under this section extends as process  
32 to all parts of the state and may be served by any person  
33 authorized to serve process of courts of record or by any person  
34 designated for that purpose by the Special Counsel or his or her  
35 designee. The person serving this process may receive  
36 compensation as allowed by the Special Counsel or his or her  
37 designee, not to exceed the fees prescribed by law for similar  
38 service.

39 19677. (a) The superior court in the county in which any  
40 interview is held under the direction of the Special Counsel or his

1 or her designee has jurisdiction to compel the attendance of  
2 witnesses, the making of oral or written sworn statements, and  
3 the production of papers, books, accounts, and documents, as  
4 required by any subpoena issued by the special counsel or his or  
5 her designee.

6 (b) If any witness refuses to attend or testify or produce any  
7 papers required by the subpoena, the Special Counsel or his or  
8 her designee may petition the superior court in the county in  
9 which the hearing is pending for an order compelling the person  
10 to attend and answer questions under penalty of perjury or  
11 produce the papers required by the subpoena before the person  
12 named in the subpoena. The petition shall set forth all of the  
13 following:

14 (1) That due notice of the time and place of attendance of the  
15 person or production of the papers has been given.

16 (2) That the person has been subpoenaed in the manner  
17 prescribed in Section 19676.

18 (3) That the person has failed and refused to attend or produce  
19 the papers required by subpoena before the Special Counsel or  
20 his or her designee as named in the subpoena, or has refused to  
21 answer questions propounded to him or her in the course of the  
22 interview under penalty of perjury.

23 (c) Upon the filing of the petition, the court shall enter an  
24 order directing the person to appear before the court at a  
25 specified time and place and then show cause why he or she has  
26 not attended, answered questions under penalty of perjury, or  
27 produced the papers as required. A copy of the order shall be  
28 served upon him or her. If it appears to the court that the  
29 subpoena was regularly issued by the Special Counsel or his or  
30 her designee, the court shall enter an order that the person appear  
31 before the person named in the subpoena at the time and place  
32 fixed in the order and answer questions under penalty of perjury  
33 or produce the required papers. Upon failure to obey the order,  
34 the person shall be dealt with as for contempt of court.

#### 35 Article 6. Reporting Requirements

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37  
38 19680. Notwithstanding Section 7550.5, the Special Counsel  
39 shall submit an annual report to the Legislature and to the  
40 members of the State Personnel Board on the activities of the

1 office. The report shall include the number, types, and  
2 disposition of allegations of prohibited personnel practices filed  
3 with it, investigations conducted by it, cases in which it did not  
4 make a determination whether there are reasonable grounds to  
5 believe that a prohibited personnel practice has occurred, exists,  
6 or may be taken within the 240-day period specified in paragraph  
7 (1) of subdivision (a) of Section 19665, and actions initiated by it  
8 before the board.

9 SEC. 6. Article 1 (commencing with Section 19680) of  
10 Chapter 10 of Part 2 of Division 5 of Title 2 of the Government  
11 Code is repealed.

12 SEC. 7. Section 19702 of the Government Code is amended  
13 to read:

14 19702. (a) A person shall not be discriminated against under  
15 this part on any basis listed in subdivision (a) of Section 12940,  
16 as those bases are defined in Sections 12926 and 12926.1, except  
17 as otherwise provided in Section 12940. A person shall not be  
18 retaliated against because he or she has opposed any practice  
19 made an unlawful employment practice, or made a charge,  
20 testified, assisted, or participated in any manner in an  
21 investigation, proceeding, or hearing under this part. This  
22 subdivision is declaratory of existing law.

23 (b) For purposes of this article, “discrimination” includes  
24 harassment.

25 (c) If the board finds that a person has engaged in  
26 discrimination under this part, and it appears that this practice  
27 consisted of acts described in Section 243.4, 261, 262, 286, 288,  
28 288a, or 289 of the Penal Code, the board, with the consent of the  
29 complainant, shall provide the local district attorney’s office with  
30 a copy of the board’s decision and order.

31 (d) (1) Except as otherwise provided in paragraph (2), if the  
32 board finds that discrimination has occurred in violation of this  
33 part, the board shall issue and cause to be served on the  
34 appointing authority an order requiring the appointing authority  
35 to cause the discrimination to cease and desist and to take any  
36 action, including, but not limited to, hiring, reinstatement, or  
37 upgrading of employees, with or without backpay, and  
38 compensatory damages, which, in the judgment of the board, will  
39 effectuate the purposes of this part. Consistent with this  
40 authority, the board may establish rules governing the award of



1 compensatory damages. The order shall include a requirement of  
2 reporting the manner of compliance.

3 (2) Notwithstanding paragraph (1), this paragraph applies to  
4 state employees in State Bargaining Unit 6 or 8. If the board  
5 finds that discrimination has occurred in violation of this part, the  
6 board shall issue and cause to be served on the appointing  
7 authority an order requiring the appointing authority to cause the  
8 discrimination to cease and desist and to take any action,  
9 including, but not limited to, hiring, reinstatement, or upgrading  
10 of employees, with or without backpay, adding additional  
11 seniority, and compensatory damages, which, in the judgment of  
12 the board, will effectuate the purposes of this part. Consistent  
13 with this authority, the board may establish rules governing the  
14 award of compensatory damages. The order shall include a  
15 requirement of reporting the manner of compliance.

16 (e) Any person claiming discrimination within the state civil  
17 service may submit a written complaint that states the particulars  
18 of the alleged discrimination, the name of the appointing  
19 authority, the persons alleged to have committed the unlawful  
20 discrimination, and any other information that the board may  
21 require. The complaint shall be filed with the appointing  
22 authority or, in accordance with ~~board rules~~ *Article 3*  
23 *(commencing with Section 19660) of Chapter 9.5 of Part 2 of*  
24 *Division 5, with the board itself Office of the Special Counsel,*  
25 *except for complaints that are filed pursuant to paragraph (1) of*  
26 *subdivision (h).*

27 (f) (1) Complaints shall be filed within one year of the alleged  
28 unlawful discrimination or the refusal to act in accordance with  
29 this section, except that this period may be extended for not  
30 greater than 90 days following the expiration of that year, if a  
31 person allegedly aggrieved by unlawful discrimination first  
32 obtained knowledge of the facts of the alleged unlawful  
33 discrimination after the expiration of one year from the date of its  
34 occurrence. Complaints of discrimination in adverse actions or  
35 rejections on probation shall be filed in accordance with Sections  
36 19175 and 19575.

37 (2) Notwithstanding paragraph (1), this paragraph shall apply  
38 only to state employees in State Bargaining Unit 8. Complaints  
39 shall be filed within one year of the alleged unlawful  
40 discrimination or the refusal to act in accordance with this

1 section, except that this period may be extended for not greater  
2 than 90 days following the expiration of that year, if a person  
3 allegedly aggrieved by unlawful discrimination first obtained  
4 knowledge of the facts of the alleged unlawful discrimination  
5 after the expiration of one year from the date of its occurrence.  
6 Complaints of discrimination in disciplinary actions defined in  
7 Section 19576.5 shall be filed in accordance with that section.  
8 Complaints of discrimination in all other disciplinary actions  
9 shall be filed in accordance with Section 19575. Complaints of  
10 discrimination in rejections on probation shall be filed in  
11 accordance with Section 19175.3.

12 (g) If an employee of the appointing authority refuses, or  
13 threatens to refuse, to cooperate in the investigation of a  
14 complaint of discrimination, the appointing authority may seek  
15 assistance from the ~~board~~ *Office of the Special Counsel*. The  
16 ~~board~~ *Office of the Special Counsel* may provide for direct  
17 investigation or ~~hearing~~ *prosecution* of the complaint, the use of  
18 subpoenas, or any other action that will effectuate the purposes of  
19 this section.

20 (h) If a person demonstrates by a preponderance of evidence  
21 that the person's opposition to any practice made an unlawful  
22 employment practice under this part, or the person's charging,  
23 testifying, assisting, or participation in any manner in an  
24 investigation, proceeding, or hearing under this part, was a  
25 contributing factor in any adverse employment action taken  
26 against him or her, the burden of proof shall be on the supervisor,  
27 manager, employee, or appointing power to demonstrate by clear  
28 and convincing evidence that the alleged adverse employment  
29 action would have occurred for legitimate, independent reasons  
30 even if the person had not engaged in activities protected under  
31 this part. If the supervisor, manager, employee, or appointing  
32 power fails to meet this burden of proof in any administrative  
33 review, challenge, or adjudication in which retaliation has been  
34 demonstrated to be a contributing factor, the person shall have a  
35 complete affirmative defense to the adverse employment action.

36 (i) As used in this part, "adverse employment action" includes  
37 promising to confer, or conferring, any benefit, effecting, or  
38 threatening to effect, any reprisal, or taking, or directing others to  
39 take, or recommending, processing, or approving, any personnel  
40 action, including, but not limited to, appointment, promotion,

- 1 transfer, assignment, performance evaluation, suspension, or
- 2 other disciplinary action.

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